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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

W.R. GRACE & CO., et al.,

Petitioners,

—v.—

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, And A Conditionally Certified Class,

Respondents,

THE HONORABLE JAMES McGIRR KELLY,

Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below was correct in finding that, as a matter of law, it was powerless to consider a petition for a writ of mandamus to review the trial court's certification of (or refusal to decertify) an alleged class action.

2. Whether refusal of the court below to consider the petition was an abuse of discretion when this alleged diversity class action was scheduled to be tried shortly on "common issues" arising under conflicting legal standards (involving the laws of some 50 jurisdictions) pursuant to a trial plan which, *e.g.*, calls for punitive damages being assessed against defendants before any determination of liability or compensatory damages with respect to any defendant.

PARTIES BELOW

In Case No. 90-1217, the petitioners, in addition to W.R. Grace & Co., were The Celotex Corporation, Carey Canada Inc., Armstrong World Industries, Inc., Asbestos Corp., Ltd., Bell Mines, Ltd., Asten Group, Inc., Basic, Inc., Benjamin Foster-Amchem, Union Carbide Corp., Cassiar Resources, Ltd., Brinco Mining, Dana Corporation, Empire Ace Insulation, Fibreboard Corp., GAF Corporation, Georgia-Pacific Corp., Uniroyal, Inc., Kaiser Cement Corp., Pfizer Inc., Pittsburgh Corning Corp., H.K. Porter Corp., Southern Textile Corp., Rockwool Manufacturing Co., Wilkin Insulation, C. Tennant & Sons and U.S. Mineral. Respondents were Barnwell School District No. 45, School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools and a Conditionally Certified Class. The Honorable James McGirr Kelly, United States District Judge for the Eastern District of Pennsylvania, was a nominal respondent. Defendant National Gypsum Company submitted papers characterizing itself as a respondent in No. 1217.

Consolidated with Case No. 90-1217 was Case No. 90-1219, in which, the petitioner was Eagle-Picher Industries, Inc., which has since gone into bankruptcy.

Rule 29.1 Statement

Pursuant to Rule 29.1, the Court is advised that W.R. Grace & Co. (renamed W.R. Grace & Co.-Conn. since the pleadings herein) is now a wholly owned subsidiary of W.R. Grace & Co., a publicly traded company with no parent company. Other than wholly-owned subsidiaries, subsidiaries of petitioner or its parent (or their subsidiaries) are Del Taco Corporation, Del Taco Restaurants, Inc., Grace Energy Corporation, Grace Drilling Company and La Posta Recycling Center Inc.

The Rule 29.1 statements regarding other petitioners appear at pages 1a and 2a of the Appendix.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in *In re School Asbestos Litigation*, No. 90-1217, 921 F.2d 1338 (3d Cir. 1990), filed on December 13, 1990, and amended on January 7, 1991.

OPINIONS BELOW

The decision below, *In re School Asbestos Litigation*, No. 90-1217, 921 F.2d 1338 (3d Cir. 1990), refused to consider, on the ground that the Court lacked the power to do so, defendants' petition for a writ of mandamus to review the trial court's refusal to decertify this alleged diversity class action. (District Court Pretrial Order No. 203, dated January 11, 1990, unreported but reprinted in the Appendix hereto, 3a-9a.)

The District Court originally certified this case in 1984 as a Fed. R. Civ. P. 23(b)(3) "opt-out" class for compensatory damages and a Fed. R. Civ. P. 23(b)(1)(B) mandatory class for punitive damages. *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984) and 107 F.R.D. 215 (E.D. Pa. 1985). In response to a certified question, the Third Circuit at that time affirmed the Rule 23(b)(3) certification and reversed the Rule 23(b)(1)(B) certification. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). Thereafter, the District Court entered the following Pretrial Orders which are unreported and are reprinted in the Appendix hereto:

(a) Order No. 167, dated January 27, 1989, recognizing that under the governing choice of law rules and *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), the substantive laws of each class member's state or

other jurisdiction (more than 50 jurisdictions in all) governs its claim in this case (10a-15a).

(b) Order No. 169, dated January 27, 1989, requiring the parties to file a Joint Pretrial Order on or before May 1, 1990 and requiring that this action be placed in the trial pool of June 1, 1990 (16a).

(c) Order No. 203, dated January 11, 1990, denying defendants' motion for decertification of the class (17a-20a).

(d) Order No. 235, dated May 17, 1990, identifying seven issues to be tried in Phase I of the trial, and requiring the parties to propose factual interrogatories pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, and to advise the court of the jurisdictions to which they pertain (21a-22a). The District Court has since advised the parties that the Phase I trial will commence this summer (1991).

JURISDICTION

Plaintiffs allege that the court has federal subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332 (1988), because many—but, as the complaint concedes, not all—of the class members have claims in excess of $10,000.[1]

In the proceeding below, the jurisdiction of the United States Court of Appeals for the Third Circuit was invoked under 28 U.S.C. § 1651 (1988) and Rule 21 of the Federal

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1 Various petitioners have joined in a petition for a writ of *certiorari* filed herewith seeking this Court's review of two related decisions, *In re School Asbestos Litigation*, 921 F.2d 1310 (3d Cir. 1990), and *In re School Asbestos Litigation*, 921 F.2d 1330 (3d Cir. 1990). That petition, and Judge Cowen's thoughtful dissents below, demonstrate that diversity jurisdiction is lacking here because (1) many or most plaintiffs cannot allege damages sufficient to satisfy the applicable $10,000 minimum jurisdictional amount and (2) a number of class members are citizens of the same state as a defendant.

Rules of Appellate Procedure. Here, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988). The Petition is being timely filed within 90 days of the Third Circuit's December 13, 1990 decision, amended January 7, 1991.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The text of the Seventh Amendment to the United States Constitution, the All Writs Act, 28 U.S.C. § 1651, the Rules of Decision Act, 28 U.S.C. § 1652 (1988), and Rule 23 of the Federal Rules of Civil Procedure are set forth in the Appendix at 23a, 24a, 25a and 26a-28a, respectively.

STATEMENT OF THE CASE

Original Class Certification

These three alleged class actions (now consolidated) were filed in 1983 and 1984 in the United States District Court for the Eastern District of Pennsylvania on behalf of a putative nationwide class of all public and private elementary and secondary schools.[2] The complaints allege products liability property damage claims against approximately fifty defendants and seek to recover potentially billions of dollars in damages allegedly resulting from the installation in the class members' buildings (over a period of almost one hundred years) of hundreds of different asbestos-containing products mined, milled, manufactured, sold or installed by the defendants.

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2 *School District of Lancaster, et al.* v. *Lake Asbestos of Quebec, et al.*, No. 83-0268 (E.D. Pa.) (filed January 17, 1983 by three Pennsylvania school districts (Lancaster, Manheim Township and Lampeter-Strasburg)); *Barnwell School District* v. *U.S. Gypsum Co., et al.*, No. 83-1395 (E.D. Pa.) (filed March 23, 1983 by the Barnwell School District No. 45 of Barnwell, South Carolina); *Board of Education of the Memphis City Schools* v. *U.S. Gypsum, et al.*, No. 84-2312 (E.D. Pa.) (filed May 11, 1984 by the school districts of Memphis, Tennessee and Napa Valley, California).

In 1984, the District Court (James McGirr Kelly, J.) certified a nationwide opt-out class under Fed. R. Civ. P. 23(b)(3) of all public and private elementary and secondary schools to pursue compensatory damages based on the alleged presence of defendants' asbestos containing products in their various school buildings.[3] At the same time, Judge Kelly also certified a mandatory class under Fed. R. Civ. P. 23(b)(1)(B) to seek punitive damages. As noted above, the Third Circuit vacated the mandatory class certification but affirmed certification of the opt-out class "despite misgivings on manageability". *In re School Asbestos Litigation*, 789 F.2d 996, 998-99 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986). The court explained:

> "at the present stage, manageability is a serious concern
>
> . . . .
>
> • • •
>
> We point out the critical fact that certification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper." *Id.* at 1011.

In September 1987, notice of the litigation was mailed to over 36,000 public and private school districts stating that, unless they excluded themselves from the litigation, they would be bound by any class judgment and would share in any compensatory damage recovery on behalf of the class. Over 1,500 school districts excluded themselves, many of them in the country's largest cities.

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3 Shortly after the Third Circuit denied the petition for mandamus, the trial court permitted the plaintiffs to redefine the class so as to include only those schools containing "friable asbestos-containing building materials" (Pretrial Order No. 273, filed Dec. 17, 1990). Their amended complaints all define "friable asbestos-containing material" as any asbestos-containing material that, "when dry, may be crumbled, pulverized, reduced to powder by hand pressure, or which is otherwise easily damaged." *See, e.g.*, Third Amended Complaint ¶ 6, *School District of Lancaster, et al.* v. *Lake Asbestos of Quebec, et al.*, No. 83-0268 (E.D. Pa.).

Decertification Proceedings in the District Court

When this class was certified in 1984, no asbestos-in-buildings case had been tried. Based on subsequent experiences in such cases, as well as subsequent scientific and legal developments, almost all of the defendants moved to decertify the class action in April of 1989. They showed, among other things, that substantial trial experience had demonstrated that every asbestos-in-buildings claim requires proof that airborne asbestos fibers have emanated at hazardous levels from the defendant's product in place in the plaintiff's building.[4] Since that issue, as well as the claimant's knowledge of any alleged danger of asbestos, are inherently individual to each plaintiff, asbestos-in-buildings claims are clearly unsuitable for class action treatment. They further showed that this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), requires the application of the varying and often conflicting laws of over 50 jurisdictions to the class members' claims, as the District Court recognized in its January 27, 1989 Pretrial Order No. 167, 10a-15a. These two factors alone dispel any illusion of commonality or manageability here, and show that the requirements of Rule 23 (26a-28a) cannot be met.

On January 11, 1990, the District Court, without a hearing, issued Pretrial Order No. 203 denying the motion for decertification, 17a-20a. Its three-page memorandum acknowledged the "individualized" nature of the products liability issues as well as the necessity of applying the substantive law of each state to claims arising there. Nevertheless, the District Court held, without explanation, that "common" issues which would not determine liability predominate, and that

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4 *E.g.*, *3250 Wilshire Boulevard Building* v. *W.R. Grace & Co.*, No. 87-6048-WMB, slip op. at p. 20 n.2 (C.D. Cal. July 24, 1989), *reprinted in* 1989 Mealey's Asbestos Prop. Actions Litig. Rep. D-1 (Aug. 4, 1989) ("In different contexts, courts may find that MK-3 [W.R. Grace's fireproofing product] may present a significant, or no risk of personal or property damage *depending on the condition of the material in a building*" (emphasis added)).

> "[t]he requirements of *Shutts* do not pose a problem in light of the 'strictest law' proposal of the plaintiffs and the possibility of creating subclasses in order to accommodate any necessary groupings of variances in products liability law among the states." (Pretrial Order No. 203, 19a)

These suggested "solutions" posited by the District Court are both inconsistent and impractical. The first would deprive class members not bound by the "strictest law" applicable to any issue of the more favorable laws of their own states (contrary to *Shutts*). The second would have the same class members in several different issue sub-classes, depending on the legal issue involved (since the states are aligned differently on the dozens of different legal issues here raised) without any class representative having qualified for any such sub-class. Perhaps in recognition of these difficulties, in the end the trial court abandoned both of these approaches in Pretrial Order No. 235 (22a).

The District Court's memorandum accompanying Pretrial Order No. 203 did not address any of the substantial reasons for decertification raised by defendants' motion such as the factual, legal and regulatory changes since 1984. Instead, it simply stated that none of the considerations urged by defendants were "novel or representative of changed circumstances" relevant to class certification (19a).

Proceedings in the Court Below

The motion to decertify was filed on April 24, 1989, and denied almost nine months later on January 11, 1990—four and a half months before the case was scheduled to be placed in the June 1990 trial pool. On January 29, 1990, the District Court denied a request for 28 U.S.C. § 1292(b) (1988) certification of the jurisdictional issue filed on November 22, 1989. Faced with the impending trial and the delay a § 1292(b) request would cause, twenty-seven defendants coordinated to file, on March 21, 1990, a single petition for a writ of man-

damus in the Third Circuit (Case No. 90-1217), seeking review of the refusal to decertify the nationwide class.

On May 17, 1990, while the petition was pending, the District Court issued a Phase I trial plan which adopted yet a third "solution" to the *Shutts* problem of conducting a jury trial under the laws of over fifty jurisdictions—*i.e.*, the court would ask the jury purely "factual interrogatories" which are to be submitted by the parties, along with a list of each jurisdiction to which they apply (Pretrial Order No. 235, 22a) and then the court would itself apply the varying state laws to the answers. Pretrial Order No. 235 (21a-22a) specified the issues to be tried in Phase I as:

> "A. The level at which various kinds of friable asbestos, in various forms, is hazardous in school buildings.
>
> B. Defendants' knowledge of the health hazards of asbestos.
>
> C. Defendants' failure to properly warn or test.
>
> D. Defendants' fraudulent concealment of knowledge of the dangers of asbestos.
>
> E. Defendants' conspiracy to suppress knowledge of the dangers of asbestos.
>
> F. Punitive damages.
>
> E. Common defenses." (Pretrial Order 235, 21a)

Notably absent from these issues is any effort to determine which, if any, of the plaintiffs has any defendant's product in its buildings, or whether any defendant's product would give rise to liability. Thus, even after the proposed protracted multi-party trial on the above-listed issues, the District Court would still not know what defendants were properly before it, which defendants' products or class members' buildings are involved in the case, or who was bound by any Phase I decision on either side (since those plaintiffs who meet the jurisdictional amount would not have been identified).

In addition to so arguing to the Third Circuit, petitioners pointed out that it had become apparent that the District Court's proposed "solution" to the *Shutts* problem imperiled defendants' rights to a unitary jury trial under the Seventh Amendment and this Court's ruling in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931).

In its brief opinion filed on December 13, 1990, as amended on January 7, 1991,[5] the Third Circuit refused to consider the merits of the mandamus petitions. Instead, it held that its prior decision in *DeMasi* v. *Weiss*, 669 F.2d 114 (3d Cir. 1982), "precludes the use of mandamus to reverse the grant or denial of a class certification." 921 F.2d at 1341, 9a. The author of *DeMasi*, Judge Aldisert, summarized it during oral argument as saying that a certification issue "could only come up on 1292" (Tr. of Oral Argument, 29a). When counsel for W.R. Grace & Co. pointed out that *DeMasi* stated that § 1292(b) was the only proper route to review "at least in this case," Judge Aldisert replied, "[w]hen we said 'at least in this case,' we were talking about 1292(b). The point is if it is not 12—if it is not a final order under 1291, how can it come up on mandamus?" (Tr. of Oral Argument, 29a).

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5 In filing its initial opinion on December 13, 1990, the Third Circuit mistakenly assumed that the Celotex Corporation, which by that time had filed for bankruptcy, was the only petitioner in Case No. 90-1217; it therefore stayed No. 90-1217 under 11 U.S.C. § 362 (1988). In fact, that petition was also explicitly filed on behalf of twenty-six other petitioners. When that fact was called to its attention, the Court below amended its opinion on January 7, 1991, making clear that the petition in No. 90-1217 was denied with respect to all petitioners other than Celotex on the same ground as the initial denial of similar relief to defendant Eagle Picher Industries, Inc. in No. 90-1219, 7a and 9a. However, it failed to correct its obviously mistaken reference in the text to "the petitioners, who are two of the fifty defendants in the district court" (8a).

REASONS FOR GRANTING THE WRIT

The trial court has certified a nationwide class of all public and private school districts to pursue inherently individual diversity claims involving the conflicting laws of some 50 jurisdictions. Its trial plan to solve the resulting *Shutts* problem is to submit fractionated factual issues to the jury without any legal instruction or any advice as to the legal consequences of the jury's verdicts. Moreover, the trial plan would have the jury make punitive damage and other findings before hearing evidence that could lead to any finding of liability or compensatory damages.

This proposed class action trial, scheduled for this coming summer, threatens defendants with imminent and irreparable deprivation of basic constitutional rights. Yet the court below held that the trial court's class action rulings, no matter how arbitrary, could *never* be challenged by a petition for a writ of mandamus. It ruled that its own prior decision, *Demasi* v. *Weiss*, 669 F.2d 114 (3d Cir. 1982), "precludes the use of mandamus to reverse the grant or denial of a class certification", 921 F.2d at 1341, 9a, and proclaimed that it was issuing its published opinion in order to emphasize this broad holding. *Id.*

The effect of this ruling is that if a trial court refuses § 1292(b) certification of its treatment of an alleged class action, its decision (no matter how improper or violative of basic rights) is simply not reviewable until a final judgment is entered *after* the trial that petitioners claim will irreparably injure them in violation of their due process and other rights. Indeed, under the trial court's plan to have a jury assess punitive damages before any finding that any defendant is properly in the case, defendants faced with a huge contingent liability for punitive damages may well be unable to obtain appellate review at any stage.[6] But even assuming that relief

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6 At least eight defendants have recently gone into bankruptcy occasioned by asbestos liabilities: Celotex Corp., Carey Canada Inc., Ray-

would ultimately be available, it would only be after the expenditure of many man-years of judicial and legal efforts in adjudicating, prosecuting and defending this mammoth class action.

Quite apart from this manifest injustice, the decision below also creates a conflict with contrary rulings by at least five other Courts of Appeals which have granted mandamus to correct class certification orders. We respectfully submit that it should be reviewed and corrected by this Court before other circuit courts follow suit and arbitrarily close their doors to litigants seeking relief from the arbitrary acts of trial courts.

ARGUMENT

I.

THE DECISION BELOW CREATES A CONFLICT WITH AT LEAST FIVE OTHER CIRCUITS

The statutory basis for the writ of mandamus is found in the All Writs Act, 28 U.S.C. § 1651 (24a), which provides in pertinent part:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 1651(a). The general principles governing the issuance of mandamus are well established and were recently summarized by this Court:

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mark Industries, Inc., National Gypsum Co., Nicolet, Inc., Eagle-Picher Industries, Inc., H.K. Porter Corp. and Southern Textile Corp. A Phase I punitive damage verdict may well pressure other defendants to settle or file for bankruptcy—in either case foregoing appellate review.

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. . . . Although we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of jurisdiction, we have required that petitioners demonstrate a clear abuse of discretion or conduct amounting to usurpation of [the judicial] power, to be entitled to issuance of the writ. To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek, and carry the burden of showing that [their] right to issuance of the writ is clear and indisputable."

Mallard v. *United States District Court*, 490 U.S. 296, 308-09 (1989) (quotation marks and citations omitted).

The basic question here is not whether these petitioners were entitled to have the writ of mandamus issued (although we submit they clearly were), but whether class certification or decertification orders should be immunized from mandamus review, regardless of the circumstances. This Court has "answered the question as to the availability of mandamus . . . with the refrain: 'What never? Well, *hardly* ever!' " *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam, emphasis in original). The result below rewrites the refrain to read: "What never? *Absolutely* never for class action issues."

In stark contrast, the Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have all *granted* writs of mandamus vacating district court orders relating to class certification. Indeed, prior to its decision in this case, it appeared that the same rule applied in the Third Circuit. *Lusardi* v. *Lechner*, 855 F.2d 1062 (3rd Cir. 1988), considered a petition for review of a trial court's order decertifying an age discrimination "opt-in" class which the court analogized to a Rule 23 class (*id.* at

1068 n.8 and 1074 n.15). The representative plaintiffs filed both an appeal (which was dismissed) and a mandamus petition, as to which the opinion states:

> "when no other avenue is open, *i.e.*, when a party seeking the writ has no other adequate means to attain the relief he desires and the court below has committed a clear error of law, it may issue."

Id. at 1069 (citing cases). Thereafter, specifically with reference to review of a class determination, the court stated that the writ is not available "*unless* the district court acts 'outside its jurisdiction' or 'in disregard of appropriate procedural safeguards' ". *Lusardi*, 855 F.2d at 1074, quoting *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 at 752 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974) (emphasis added). While denying the writ in other respects, the court issued mandamus to correct the class notice provisions of the decertification order; it further directed the district court to reconsider that order and continued a stay of it meanwhile. *Lusardi*, 855 F.2d at 1080.

Five other circuit courts have not only considered mandamus an appropriate route for review of class certification, but have also granted the writ to correct errors of the trial courts. *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984), reviewed by mandamus the certification of a Rule 23 class for settlement purposes and expressly rejected the notion that mandamus was inappropriate.

> "While recognizing that the Supreme Court has admonished the circuit courts to issue writs of mandamus only in the most extraordinary circumstances, we believe that this admonition is only 'a starting point in the effort to develop a specific framework which can assist when practical applications of the generalities is required.' "

Id. at 303, *quoting Bauman* v. *United States District Court*, 557 F.2d 650, 654 (9th Cir. 1977). In the absence of any guidance from this Court providing such a "specific framework", the Sixth Circuit referred to the considerations deline-

ated by the Ninth Circuit in *Bauman*, and issued the writ of mandamus requiring vacation of the certification order.[7] 749 F.2d at 307; *see also In re Allied-Signal, Inc.*, 915 F.2d 190, 193 (6th Cir. 1990) (noting the district court's agreement, at oral argument of the mandamus petition, to vacate its prior class action orders in asbestos personal injury cases and affirming the propriety of using mandamus to correct the trial court's usurpation of power).

Similarly, plaintiffs in asbestos personal injury actions were granted a writ of mandamus vacating class certification in *In re Temple*, 851 F.2d 1269 (11th Cir. 1988), because the court found "clearly erroneous" the district court's findings of commonality and typicality. It explained:

> "Although the record on commonality and typicality of the class is sparse, the district court's order on its face encompasses a potentially wide variety of different conditions caused by numerous different types of exposures. We have no indication that claimants' experiences share any factors other than asbestos and Raymark in common."

Id. at 1273 (footnote omitted); *see also In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1542 (11th Cir. 1987).

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7 The five factors, but not prerequisites, were formulated by the *Bauman* court as follows:

> "(1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
>
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression."

Bauman, 557 F.2d at 654-55 (citations omitted). "[R]arely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable." *Id.* at 655.

In re Fibreboard Corp., 893 F.2d 706, 709 (5th Cir. 1990), was another asbestos personal injury mandamus proceeding in which the Fifth Circuit concluded that a proposed class action trial plan was flawed.

Schmidt v. *Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975) (per curiam), was an action brought by employees under the Fair Labor Standards Act which the district court permitted to be maintained as a class action under Fed. R. Civ. P. 23. The Eighth Circuit noted that "class actions place an enormous burden of costs and expense upon the parties," and held that mandamus review was available "where the issue presented is one of a clear usurpation of power by the district court". 527 F.2d at 535. It granted mandamus and directed the district court to vacate its orders certifying the class action. *Id.* at 536-37; *see also Sperry Rand Corp.* v. *Larson*, 554 F.2d 868, 872 (8th Cir. 1977); *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 216 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975).

On at least two occasions, the Ninth Circuit has granted a writ of mandamus ordering a district court to vacate a class certification order. *McDonnell Douglas Corp.* v. *United States District Court*, 523 F.2d 1083, 1087 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *Green* v. *Occidental Petroleum Corp.*, 541 F.2d 1335, 1338-40 (9th Cir. 1976). In the latter case, the court held that issuance of the writ was within its authority under 28 U.S.C. § 1651, "particularly since we could later entertain appeals on these issues", and continued:

> "We recognize that the issuance of this writ should be limited to exceptional circumstances, and share the Second Circuit's view that orders granting class certification are the proper subject for mandamus in only the most extraordinary circumstances. *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 648 (2nd Cir. 1974). However, we also note the utility of mandamus as a tool to supervise the proper judicial administration in the district courts."

Green, 541 F.2d at 1338-39; *see also Arthur Young & Co.* v. *United States District Court*, 549 F.2d 686, 691-92 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977).

Finally, other decisions of the First, Second and Seventh Circuit Courts of Appeals have recognized that mandamus vacating class certification orders is appropriate when circumstances warrant. *Lamphere* v. *Brown University*, 553 F.2d 714, 718 (1st Cir. 1977) ("[a]n error of this sort might impel us to intervene in mandamus"); *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974) (mandamus review of class certification order only in the most extraordinary circumstances); *Anschul* v. *Sitmar Cruises, Inc.*, 544 F.2d 1364, 1368-69 & 1368 n.5 (7th Cir.) (mandamus available " 'with respect to the grant or denial of class action status' " in cases of arbitrariness), *cert. denied*, 429 U.S. 907 (1976).[8]

II.

THE RESULT BELOW ARBITRARILY DEPRIVES LITIGANTS OF RELIEF FROM ARBITRARY ACTIONS OF TRIAL COURTS EVEN THOUGH THEY VIOLATE CONSTITUTIONAL RIGHTS

By adopting its rigid rule, the Third Circuit has arbitrarily foreclosed an important, albeit extraordinary, check on the abuse of power by district courts. Although the issue raised by this petition—the refusal of the court below to even consider the merits of the mandamus petition—does not require this Court to determine whether the writ of mandamus should have been issued, the basis for the petition does illustrate the need for the availability of mandamus review.

This Court has established that, because a class certification order is not a "final decision", appellate review is not

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8 *Cf. Gold Strike Stamp Co.* v. *Christensen*, 436 F.2d 791, 792 n.2 (10th Cir. 1970) (declining to address the issue, but stating that "[i]t is entirely conceivable that the facts presented in a particular case may justify the immediate review of an order allowing a case to proceed as a class action").

available under 28 U.S.C. § 1291 (1988).[9] While petitioners had a theoretical possibility of having the trial court certify the issue pursuant to 28 U.S.C. § 1292(b) (1988), that court had stated its intention to proceed to trial within four and a half months, and had acted on other motions for 28 U.S.C. § 1292(b) certification months after they were filed—usually to deny the request.[10] As a practical matter, therefore, there simply was no opportunity for effective appellate review pursuant to § 1292(b) prior to the scheduled trial date. *See* Tr. of Oral Argument, United States Court of Appeals for the Third Circuit, Nos. 90-1217, 90-1219, Sept. 19, 1990, at 166-67 (29a-31a).

Unless reversed, the decision below may well preclude appellate review of the refusal to decertify at any time. The proposed Phase I trial plan, as outlined by Pretrial Order 235, will not result in any appealable order because no claim will have been tried to judgment. *See Manual For Complex Litigation, Second* § 30.17 (1985) (where certifying a class action for trial on special issues, the court should "ensure that the issues certified for class action treatment . . . will, when judgment is entered, support appellate review"). Thus, in the absence of the availability of mandamus, defendants will be compelled to submit to a lengthy trial, raising serious constitutional issues, which may result in ruinous punitive damages being assessed before any finding of liability or compensatory damages. That trial will result in a colossal waste of time and expense (on the part of both the judiciary and the litigants) if appellate review someday establishes that defendants' mandamus application was well founded. But even worse, a substantial punitive damages verdict in Phase I, without any prospect of appellate review until many years in

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9 In *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), the Court rejected the argument that class certification orders were appealable under 28 U.S.C. § 1291 and the "death knell" doctrine.

10 On November 2, 1984, defendants moved for § 1292(b) certification of the original order granting class treatment. The District Court did not decide the motion until March 28, 1985—some five months after the request. That is the only instance in which the trial court granted a § 1292(b) motion.

the future, may well put pressure on defendants to settle and give up their rights to ultimate vindication or to seek bankruptcy to avoid this contingent liability. (*See* fn. 6 at p. 9 above).

The trial plan contemplates partial jury verdicts in Phase I without the jury being instructed on the applicable law or the legal consequences of their verdicts, followed by a subsequent trial or trials (perhaps in different jurisdictions) to assess individual issues including liability and compensatory damages. This proposed class action treatment is not only inconsistent with Rule 23 (which, among other things, requires a preponderance of common issues clearly not present here) but violates defendants' rights to due process and to a unitary jury trial on issues which overlap.

The Rule 23 problems are both legal and factual. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818-23 (1985), the Rules of Decision Act (codified at 28 U.S.C. § 1652) and *Erie R. R.* v. *Tompkins*, 304 U.S. 64 (1938), as well as the Due Process and Full Faith and Credit Clauses, require district courts in nationwide diversity class actions such as this to apply the laws of each jurisdiction in which the class members' claims arise. Under *Erie*, the District Court must apply the choice of law principles of the forum state, Pennsylvania, to determine which jurisdiction's substantive law governs the action. *Id.*; *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Under Pennsylvania's choice of law principles, as limited by *Shutts*, its courts cannot apply Pennsylvania law unless Pennsylvania has a "significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class to Pennsylvania." Pretrial Order No. 167, 14a. Here, because class members (other than Pennsylvania schools) have *no* contacts with Pennsylvania, the laws of over fifty jurisdictions in which the class members' buildings are located would have to be applied to supply the substantive rules of decision. The District Court recognized this (Pretrial Order No. 167, 12a-15a) as well as the "individualized" nature of the class members' claims, but found that there were also common issues which

could be resolved without any finding of liability (Order No. 203, 18a-19a).

The combination of the inherently individual nature of these thousands of asbestos-in-buildings claims (*see* p. 5 above) and the *Shutts* requirement, standing alone, refutes plaintiffs' claim of predominantly common issues here. Moreover, although the Phase I jury verdicts would not determine any ultimate issue or any defendant's liability to any claimant, the Phase I issues (*e.g.* punitive damages) are inextricably interwoven with other issues relating to each defendant's individual liability and responsibility for compensatory damages. Under such circumstances, the District Court's proposed trial plan violates defendants' Seventh Amendment rights as elucidated by this Court's opinion in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), and its progeny.[11] The essential teaching of those cases is that having different juries pass on the same or inevitably overlapping issues such as liability and punitive damages is constitutionally impermissible because it either leaves the subsequent jury free to vitiate the first jury's findings or binds the subsequent jury to those findings in a prejudicial manner—either of which result involves a deprivation of Seventh Amendment rights.

A writ of mandamus is surely an appropriate remedy for the protection of the constitutional rights to due process and trial by jury. *See e.g.*, *Allegheny International, Inc.* v. *Allegheny Ludlum Steel Corp.*, 920 F.2d 1127, 1134 (3d Cir. 1990). Under the extraordinary circumstances well illustrated by this case, it simply cannot be that litigants faced with impending ruinous deprivations of important constitutional rights can also be deprived of any right to effective appellate review. Yet the ruling below was nothing less than an arbitrary refusal to consider the trial court's arbitrary rulings before they cause irreparable injury. That refusal should be

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11 *See, e.g., Simone* v. *Golden Nugget Hotel and Casino*, 844 F.2d 1031, 1040-41 (3d Cir. 1988); *Vizzini* v. *Ford Motor Co.*, 569 F.2d 754, 760-61 (3d Cir. 1977).

reviewed by this Court now, before it spawns further mischief in this and other cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 1, 1991

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APPENDIX

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Rule 29.1 Statements

Pursuant to Rule 29.1, the Court is advised that:

Armstrong World Industries, Inc. has no parent company and its non-wholly owned subsidiaries are Armstrong-Nylex Pty., Ltd., Armstrong/Pat Davis (China) Limited, Inarco Limited, Armstrong-ABC Company Ltd. and Recubrimientos S.A. de C.V.

Asbestos Corp., Ltd. has no non-wholly owned subsidiary and its majority shareholder is the Societe Nationale D'Amiante, which is not a publicly owned corporation.

Bell Mines, Ltd. has no non-wholly owned subsidiary and its majority shareholder is the Societe Nationale D'Amiante, which is not a publicly owned corporation.

Asten Group, Inc. has no parent company but owns stock of Asten-Hill, Inc., a Canadian Corporation. In addition, a wholly owned subsidiary of Asten Group, Inc. owns stock of COPFA, a French corporation.

Basic, Inc.'s parents and non-wholly owned subsidiaries consist of Combustion Engineering, Inc.

Dana Corporation has no parent company or non-wholly owned subsidiaries.

Empire Ace Insulation has no parent company or non-wholly owned subsidiaries.

Fibreboard Corp. has no parent company or non-wholly owned subsidiaries.

GAF Corporation has no parent company. The only subsidiary of GAF Corporation that is not wholly owned is GAF-Huls Chemie GmbH, a joint venture incorporated in Germany and co-owned by the German corporation Huls A.G.

Georgia-Pacific Corporation's parents and non-wholly owned subsidiaries consist of Great Northern Nekoosa Corp. and Thacker Land Company, Inc.

Uniroyal Holding, Inc. is the successor to Uniroyal, Inc., a dissolved company.

Kaiser Cement Corp.'s ultimate parent company is Hanson PLC. The only non-wholly owned subsidiary is Underwriters Service, Inc.

Pfizer Inc. has no parent corporation; its non-wholly owned subsidiaries consist of Laboratories Pfizer S.A., Pfizer Laboratories (Bangladesh) Ltd., Pfizer Egypt S.A.E., Agricare Limited, Pfizer Limited (India), PT Pfizer Indonesia, Livestock Feeds Limited, Pfizer Products Limited, Pfizer Laboratories Limited, Pfizer Korea Limited, Pfizer Bioquimicos, S.A., Pfizer Limited (Sri Lanka), Pfizer C. & G. Inc., Quigley Italiana S.p.A., SudFarma S.r.l., Pfizer, S.A., Pfizer Pharmaceuticals Ltd., Pfizer Quigley Korea Ltd., Dideco N.V., Sofracob S.A. and Zilc, Inc.

Pittsburgh Corning Corp.'s shareholders are PPG Industries, Inc. and Corning, Inc., each of which are fifty percent shareholders of the company.

Rockwool Manufacturing Co. has no parent company or non-wholly owned subsidiaries.

Wilkin Insulation has no parent company or non-wholly owned subsidiaries.

U.S. Mineral Products Company is a wholly owned subsidiary of Dalen Corporation (formerly Isolatek Corp.) and has no non-wholly owned subsidiaries.

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

Argued Sept. 19, 1990 Decided Dec. 13, 1990

As Amended Jan. 7, 1991

Nos. 90-1217 & 90-1219

IN RE SCHOOL ASBESTOS LITIGATION

The CELOTEX CORPORATION, Carey Canada Inc., Armstrong World Industries, Inc., Asbestos Corp., Ltd., Bell Mines, Ltd., Asten Group, Basic, Inc., Benjamin Foster-Amchem, Union Carbide Corp., Cassiar Resources, Ltd., Brinco Mining, Dana Corporation, Empire Ace Insulation, Fibreboard, GAF Corporation, Georgia-Pacific Corp., Uniroyal, Inc., W.R. Grace & Company, Kaiser Cement Corp., Pfizer, Inc., Pittsburgh Corning Corp., H.K. Porter Corp., Southern Textile Corp., Rockwool Manufacturing Co., Wilkin Insulation, C. Tennant & Sons, U.S. Mineral,

Petitioners No. 90-1217,

v.

The Honorable James McGirr KELLY,

Nominal Respondent No. 90-1217,

and

Barnwell School District No. 45, School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools And A Conditionally Certified Class,

Respondents No. 90-1217.

IN RE SCHOOL ASBESTOS LITIGATION

EAGLE-PICHER INDUSTRIES, INC.,

Petitioner No. 90-1219,

v.

The Honorable James McGirr KELLY,

Nominal Respondent No. 90-1219,

and

Barnwell School District No. 45, School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools, And A Conditionally Certified Class,

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Before

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Circuit Judges.

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

We are faced with petitions for a writ of mandamus filed by The Celotex Corporation, Carey Canada Inc., Armstrong World Industries, Inc., Asbestos Corp., Ltd., Bell Mines, Ltd., Asten Group, Basic, Inc., Benjamin Foster-Amchem, Union Carbide Corp., Cassiar Resources, Ltd., Brinco Mining, Dana Corporation, Empire Ace Insulation, Fibreboard, GAF Corporation, Georgia-Pacific Corp., Uniroyal, Inc., W.R. Grace & Company, Kaiser Cement Corp., Pfizer, Inc., Pittsburgh Corning Corp., H.K. Porter Corp., Southern Textile Corp., Rockwool Manufacturing Co., Wilkin Insulation, C. Tennant & Sons, and U.S. Mineral at No. 90-1217 and

Eagle-Picher Industries, Inc. at 90-1219 requesting us to order the district court to decertify a nationwide class of school districts seeking to recover damages from manufacturers and distributors of asbestos products. On October 12, 1990, Celotex filed for Chapter 11 bankruptcy in the United States Bankruptcy Court, Middle District of Florida, Tampa Division, at No. 100168B1. The act of filing triggers the automatic stay provisions of 11 U.S.C. § 362. Accordingly, we will stay the proceedings at No. 90-1217 in which Celotex is the petitioner. *See Association of St. Croix Condominium Owners* v. *St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir.1982). We will meet the contentions of the other petitioners at No. 90-1217 and those of Eagle-Picher on the merits and will deny relief.

I.

In 1984, the district court certified a nationwide opt-out class of school districts seeking to recover from approximately fifty defendants. The purpose of certifying the national school asbestos class was primarily to expedite the resolution of the schools' asbestos-in-buildings claims. *In re Asbestos School Litigation*, 104 F.R.D. 422, 433 (E.D.Pa.1984), *aff'd in part, rev'd in part*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 107 S.Ct. 182, 93 L.Ed.2d 117 (1986). When the case was first before us as an interlocutory appeal, certified under 28 U.S.C. § 1292(b), we reviewed the district court's decision, and substantially agreed with the rationale behind its certification, observing that:

> The use of the class action device appears to offer some hope of reducing the expenditure of time and money needed to resolve the common issues which are of substantial importance. . . . "It is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases."

Id. at 1010 (citation omitted). Though voicing some concern about manageability of the class, we acceded to the district

court's determination that the litigation would be manageable, both because of that court's greater familiarity with trial management concerns and because class actions are always subject to decertification "[w]hen, and if, the district court is convinced that the litigation cannot be managed . . ." *Id.* at 1011.

In April, 1989, the petitioners, who are two of the fifty defendants in the district court, moved for decertification, arguing, inter alia, that the class was demonstrably unmanageable. The district court denied the motion on January 11, 1990 and this petition for writ of mandamus followed.

In this litigation a question was raised as to jurisdiction. We determined in *In re School Asbestos Litig.*, 921 F.2d 1310 (3d Cir.1990) that the defendant petitioners had not met their burden of showing a "clear and indisputable lack of subject matter jurisdiction in the district court." Thus, trial court jurisdiction was proper based on 28 U.S.C. § 1332. Jurisdiction before us is premised on 28 U.S.C. § 1651 and Rule 21, F.R.A.P.

II.

On proper appeal from a final judgment, or a certification under 28 U.S.C. § 1292(b), review of the certification of a class is governed by the abuse of discretion standard. *Pa. Dental Ass'n* v. *Medical Services Ass'n of Pa.*, 745 F.2d 248, 255 (3d Cir.1984). But we are not faced with an appeal here. Instead we have a request for mandamus.

Mandamus is a drastic remedy which should be invoked only under extraordinary circumstances amounting to a judicial "usurpation of power," *Will* v. *United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305 (1967) or where there is "no other adequate means to obtain the relief . . . and the court below has committed a clear error of law." *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108, 1118 (3d Cir.1986), *cert. denied*, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987), *quoting Sporck* v. *Peil*, 759 F.2d 312, 314 (3d Cir. 1985), *cert. denied*, 474 U.S. 903, 106 S.Ct. 232,

88 L.Ed.2d 230 (1985). The party seeking mandamus has the burden of showing that its right to the writ is "clear and indisputable." *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953).

III.

We do not write on a clean slate here. We considered the precise question sub judice earlier in *DeMasi* v. *Weiss*, 669 F.2d 114 (3d Cir.1982). In *DeMasi*, we held clearly that "a class action determination, affirmative or negative, is not a final order appealable under 28 U.S.C. § 1291," 669 F.2d at 119, that the only route open "for the interlocutory review of the grant or denial of class certification, at least in this case, is pursuant to 28 U.S.C § 1292(b)," *id.*, and that "[w]e will not employ mandamus in this case to circumvent these precepts." *Id.* There are no circumstances in the matter before us now that were not present in DeMasi.

The *sine qua non* of entitlement to mandamus relief is that the party seeking the writ have no other adequate remedies, *Kerr* v. *United States District Court*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943); *Commonwealth of Pa.* v. *Newcomer*, 618 F.2d 246, 248 (3d Cir.1980). Petitioner Eagle-Picher clearly has alternative means available under 28 U.S.C. § 1292(b).

We write and publish here only to emphasize that this court adheres to its decision in *DeMasi* and does not intend to dilute our clear holding that precludes the use of mandamus to reverse the grant or denial of a class certification.

IV.

The petition of Celotex for the writ of mandamus at No. 90-1217 will be stayed. The petitions of all other petitioners at No. 90-1217 and Eagle-Picher at No. 90-1219 will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORDER NO. 167

AND NOW, this 27th day of January, 1989, in consideration of defendants' motion for summary judgment regarding the Pre-1978 Virginia School Buildings, plaintiffs' response and defendants' reply thereto, for the reasons set forth in the [annexed] Memorandum, it is ORDERED that defendants' motion for summary judgment is GRANTED and judgment is entered in favor of defendants and solely against those plaintiffs raising claims against defendants arising from the presence of asbestos-containing products in school buildings built in Virginia before January 17, 1978.

BY THE COURT:

/s/ JAMES MCGIRR KELLY
JAMES MCGIRR KELLY, J.

ENTERED: 1-27-89

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

MEMORANDUM AND ORDER

J. M. KELLY, J. JANUARY 27, 1989

The defendants in this matter have moved for summary judgment pursuant to Fed. R. Civ. P. 56 against class members regarding claims arising from asbestos-containing materials in school buildings built in Virginia before January 17, 1978.

BACKGROUND

Defendants in this action, alleged manufacturers and suppliers of asbestos-containing materials that were used in the school buildings within plaintiffs' school districts, move on the grounds that the Virginia five-year statute of repose for construction defects time-bars the plaintiffs from bringing any claims which relate to the sale or installation of asbestos-containing materials in school buildings built in Virginia before January 17, 1978.[1]

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1 The applicable Virginia statute of repose, Va. Code Ann. § 8.01-250 (1984) provides in relevant part,

> § 8.01-250. Limitation on certain actions for damages arising out of defective or unsafe condition of improvements to real property.—No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such

DISCUSSION

This court must apply the choice of law rules of the forum state, Pennsylvania. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1308 (3d Cir. 1978); *Klein v. Council of Chemical Associations*, 587 F. Supp. 213, 220 n.2 (E.D. Pa. 1984). Pennsylvania choice of law principles combine an "interest analysis" with the "significant contacts" analysis of the Restatement (Second) of Conflicts of Laws (1971). *Melville*, 584 F.2d at 1313 (3d Cir. 1978); *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970). I refer to the general rule adopted in Pennsylvania for choice-of-law questions. In Pennsylvania, "[I] should apply the law of the predominantly concerned jurisdiction, measuring the depth and breadth of that concern by the relevant contacts each affected jurisdiction had with . . . 'the policies and interests underlying the particular issue before the court.' " *Samuelson v. Susen*, 576 F.2d 546, 551 (3d Cir. 1978) (quoting *Suchomajcz v. Hummel Chemical Company*, 524 F.2d 19, 23 (3d Cir. 1975)). But choice-of-law questions involving statutes of limitations is apparently a special area where this general rule may not necessarily apply.

Pennsylvania courts ordinarily apply the Pennsylvania statute of limitations to cases involving disputes over the timely filing of a complaint. *Ross v. Johns-Manville Corp.*, 766 F.2d 823, 826 (3d Cir. 1985); *Freeman v. Lawton*, 353 Pa. 613, 46 A.2d 205, 207 (1946).[2] Plaintiffs assert that Pennsylvania courts have been scrupulous in applying the Pennsylva-

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injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.

2 A limited exception to this rule is provided by the Pennsylvania borrowing statute, 42 Pa. Cons. Stat. Ann. § 5521 (Purdon 1981).

nia statutes of limitations and cite to *Ross*, 766 F.2d at 827 in support of this proposition.[3] In light of the fact that this case involves not statutes of limitations, but statutes of repose, and there exists overwhelming indicia of contacts of this cause of action and Virginia, I find that the Virginia statute of repose is applicable and bars plaintiffs' claims with respect to those buildings located in Virginia under Pennsylvania's choice-of-law analysis.[4] This finding is further supported by considerations under the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1 of the Constitution recognized in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In *Shutts*, a case involving a class action and the constitutionality of applying the substantive law of the forum state Kansas to all claims filed by the plaintiffs, the Court stated:

> . . . the Due Process Clause and the Full Faith and Credit Clause provide[ ] modest restrictions on the application of forum law. These restrictions require[ ] 'that for a State's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts,

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3 Plaintiffs urge the application of Pennsylvania's four year statute of limitations, 42 Pa. Cons. Stat. § 5525 to plaintiffs' contracts claims and Pennsylvania's two year statute of limitations, 42 Pa. Cons. Stat. § 5524, to plaintiffs' tort claims. Plaintiffs argue that Pennsylvania's twelve year statute of repose, 42 Pa. Cons. Stat. § 5536 is inapplicable because section 5536 does not protect manufacturers of building products such as the defendants.

4 *See School Board of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325, 327-28 (Va. 1987) (distinguishing statutes of repose and statutes of limitation). At least in tort law, architects' and builders' statutes of repose typically set the commencement of the period of limitation running not when the injury to the complaining party occurs or is discovered, but upon completion of the construction. In this fashion, statutes of repose as to architects and builders often bar the cause of action before it arises and can be asserted. Annotation, *Validity and Construction, as to Claim Alleging Design Defects of Statute Imposing Time Limitations Upon Action Against Architect or Engineer for Injury or Death Arising Out of Defective or Unsafe Condition of Improvement to Real Property*, 93 A.L.R. 3d 1242 (1979).

creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair.'

Shutts, 472 U.S. at 818 (quoting *Allstate Insurance Co. v. Shutts*, 449 U.S. 302, 312-13 (1981). In *Shutts*, the Court held that application of Kansas contract and Kansas equity law to every claim in the case exceeded constitutional limits given the vast majority of the gas leases and plaintiffs involved in the case had no apparent connection with Kansas other than through the lawsuit. *Id.* at 814-15. In order to ensure that application of Pennsylvania law to this action is not arbitrary or unfair, I must find that there exists a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class to Pennsylvania. *Id.* at 821-22.

It is uncontested that the claims brought by the Virginia class members arise from damage to property (*i.e.*, school buildings) located in Virginia and all the class members asserting claims related to these Virginia school buildings are located in Virginia. In contrast, Pennsylvania contacts to this litigation result only from plaintiffs' choice of forum and the venue of this class action.

Lastly, plaintiffs allege in the complaint and hint in the response to the instant motion for summary judgment that defendants knowingly concealed and misrepresented the hazards posed by friable asbestos-containing products. *See* Complaint at ¶¶ 16, 36, 37. Plaintiffs argue that the Virginia statute of repose should not be applied because of defendants' alleged fraudulent concealment and misrepresentation. Defendants argue that as a matter of Virginia law, fraudulent concealment does not toll the Virginia statute of repose and rely principally on *School Board of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (Va. 1987). However, in *Norfolk*, the Supreme Court of Virginia decided only the question certified and explicitly did not notice the issue raised by plaintiffs with respect to the tolling of Virginia Code section 8.01-250 by defendants' alleged fraudulent concealment. *Id.* at 329. In any event, plaintiffs' response to the instant

motion contains insufficient evidence in support of this allegation.[5]

For the foregoing reasons, defendants' motion for summary judgment is granted.

5 The single piece of evidence plaintiffs provide in support of this position is a series of photocopies of advertisements of asbestos-containing products. These advertisements, without more, do not demonstrate defendants deliberately or otherwise engaged in any act of fraud or misrepresentation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORDER NO. 169

AND NOW, this 27th day of January, 1989, in consideration of certain defendants' motion to extend discovery deadline for eighteen months, and the response thereto by the plaintiffs, the Court enters the following Order:

1. All discovery shall be completed on or before December 31, 1989.

2. Expert witnesses may be deposed between January 1, 1990 and March 1, 1990.

3. The parties shall file a Joint Pretrial Order in accordance with Local Rule of Civil Procedure 21(d)(2) on or before May 1, 1990.

4. The Court shall set a final pretrial conference during the month of May, 1990.

5. This matter shall be placed in the trial pool of June 1, 1990.

BY THE COURT:

/s/ JAMES MCGIRR KELLY
JAMES MCGIRR KELLY, J.

ENTERED: 1-27-89

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORDER NO. 203

AND NOW, this 12th day of January, 1990, upon consideration of the motion of certain defendants for decertification of the class, plaintiffs' response and defendants' reply thereto, for the reasons set forth in the [annexed] Memorandum, it is ORDERED that defendants' motion is DENIED.

BY THE COURT:

/s/ JAMES MCGIRR KELLY
JAMES MCGIRR KELLY, J.

ENTERED: 1-12-90

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

MEMORANDUM AND ORDER

J. M. KELLY, J. JANUARY 11, 1990

Presently before the court is the motion of certain defendants for decertification of the class. On September 28, 1984, this court granted the motion of plaintiffs to certify a Fed.R. Civ.P. 23(b)(1)(B) mandatory class, and an opt-out class pursuant to Fed.R.Civ.P. 23(b)(3). The Third Circuit vacated this court's Order certifying the (b)(1)(B) class and affirmed the Order certifying the (b)(3) class. Certain defendants resurrect their attack on the feasibility of maintaining this class action in the instant motion.

DISCUSSION

A class action, once certified under Fed.R.Civ.P. 23(a) and 23(b), should be decertified only when it is clear there exists changed circumstances making continued class action treatment improper. *See Sley v. Jamaica Water and Utilities, Inc.*, 77 F.R.D. 391, 394 (E.D. Pa. 1977). Defendants argue that the existence of many individual issues in this class action such as defendants' alleged knowledge of the health hazards of asbestos and the alleged industry-wide conspiracy to suppress that knowledge render it no longer appropriate for class adjudication. These issues may very well be individualized in nature, but these issues are defenses which do not detract from the commonality of issues present in this case from the perspective of the class members. *See In re School Asbestos*

Litigation, 789 F.2d 996, 1011 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986). Defendants additionally argue that other individual issues such as product identification, comparative negligence and damages would remain in the case. The resolution of substantial common issues need not guarantee a conclusive finding on liability, *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985), *cert. denied*, 474 U.S. 946, nor does a need for individual calculations on the issue of damages preclude class determination of those common issues which predominate. *See Bogosian v. Gulf Oil Co.*, 561 F.2d 434, 456 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). I cannot conclude that the existence of these individual issues constitutes a sufficient basis upon which to decertify the class.

Defendants argue that this court must presently apply the laws of each relevant state to the claims of the corresponding class members as mandated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Plaintiffs assert that plaintiffs will present factual evidence sufficient to meet even the most stringent state law standards. The requirements of *Shutts* do not pose a problem in light of the "strictest law" proposal of the plaintiffs and the possibility of creating subclasses in order to accommodate any necessary groupings of variances in products liability law among the states. *See In re School Asbestos*, 789 F.2d at 1010 (plaintiffs made a creditable showing that the differences in the applicable state law did not present insuperable problems).

I note that the defendants do not present arguments which are either novel or representative of changed circumstances during the course of this litigation relevant to the requirements of class certification under Fed.R.Civ.P. 23(a). To date, no substantial manageability problems have arisen which would demonstrate to this court that proceeding on a class basis in this matter is imprudent. The common issues which exist in this case are substantial and predominate. Finally, as the Third Circuit noted in this matter, "It is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases." *In re School Asbestos Litigation*, 789

F.2d at 1010 (quoting *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 472-73 (5th Cir. 1986). For the foregoing reasons, I must deny the motion of certain defendants for decertification of the class.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

PRETRIAL ORDER NO. 235

AND NOW, this 16th day of May, 1990, in consideration of the motion for order governing conduct of the trial in this matter of the plaintiffs, the various responses of certain defendants, the reply of the plaintiffs and various defendants' sur-replies thereto, it is ORDERED that:

1. The trial of this matter shall be bifurcated. Trial of Phase 1 shall include the following issues:

A. The level at which various kinds of friable asbestos, in various forms, is hazardous in school buildings.

B. Defendants' knowledge of the health hazards of asbestos.

C. Defendants' failure to properly warn or test.

D. Defendants' fraudulent concealment of knowledge of the dangers of asbestos.

E. Defendants' conspiracy to suppress knowledge of the dangers of asbestos.

F. Punitive damages.

G. Common defenses.

2. Determination of the conduct of any additional phase(s) in this action shall be deferred until the completion of Phase 1.

3. The parties shall submit a proposed joint pretrial order in accordance with Local Rule of Civil Procedure 21(d)(2) on or before June 8, 1990. The proposed order shall include proposed factual interrogatories to the jury pursuant to Fed. R. Civ. P. 49(a) and a list by jurisdiction of which interrogatories are applicable to the law of that jurisdiction.

BY THE COURT:

/s/ JAMES McGIRR KELLY
JAMES McGIRR KELLY, J.

ENTERED: 5-17-90

CLERK OF COURT

United States Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The All Writs Act, 28 U.S.C. § 1651 (1988)

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ of rule nisi may be issued by a justice or judge of a court which has jurisdiction.

The Rules of Decision Act, 28 U.S.C. § 1652 (1988)

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Federal Rule of Civil Procedure 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litiga-

tion concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each sub-

class treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Excerpt From Transcript of September 19, 1990 Oral Argument in *In re School Asbestos Litigation*, 921 F.2d 1338 (3d Cir. 1990) (transcript pages 163-68)

[JUDGE ALDISERT]: Counsel, I'm going to interrupt you. Your argument's going to be divided this morning?

MR. MCINERNEY: Yes, Your Honor.

[JUDGE ALDISERT]: Is someone—is either of you going to discuss the question of jurisdiction of this Court to hear this argument on mandamus. In view of our Court's decision in Demasi and Weiss, saying that this could only come up on 1292(k)(1) [sic].

MR. MCINERNEY: I think that falls to me Your Honor, and I'll address it right now.

[JUDGE ALDISERT]: I'm very concerned about this.

MR. MCINERNEY: Right. In that case I read Your Honor's opinion again only this morning while listening to the argument. You wrote that "The only proper route to review was 1290 (b)—1292 (b), quote, at least in this case, unquote. That's at 669 Fed. 2d 119. Now, we did not read that to mean that mandamus is never appropriate in any case, and this, indeed, is an extraordinary case. We moved to decertify in April of '89, and that was denied on January 12, 1990 in a rather cursory opinion which appears at the first page of the appendix. On January 29, 1990, Judge Kelly denied a 1292 (b) certification on the jurisdictional issue. That's Order 208. At that point and indeed right up until last July—

[JUDGE ALDISERT]: Can I move up one paragraph.

MR. MCINERNEY: Yes, Your Honor.

[JUDGE ALDISERT]: Or the same paragraph before the 12. The first statement "We therefore adhere to the clear and settled precepts of this Court a class action determination of a terminable negative is not a final order appealable under 28 USC 1291." When we said "at least in this case," we were talking about 1292 (b). The point is if it is not 12—if it is not a final order under 1291, how can it come up on mandamus?

MR. MCINERNEY: Your Honor, I thought that the thrust of your opinion was that where there was a practical possibility of a 1292 (b) certification, that—

[JUDGE ALDISERT]: And there, there was a practical application—possibility here. But you people didn't ask for it.

MR. MCINERNEY: My point is, Your Honor—and I was just going to go through the chronology—

[JUDGE ALDISERT]: All right. I want to help you out in your argument here.

MR. MCINERNEY: Thank you.

[JUDGE ALDISERT]: This all comes under the Supreme Court 's unyielding line of cases illustrated by Kir[r] in 1976 is the sine qua non of entitlement to mandamus relief is that the party seeking the writ have no other adequate remedy.

Now, to come before us on mandamus, you have to tell us that you have no adequate remedy, and you have to tell us further that you were precluded by law from applying for an interlocutory appeal under 1292 (b).

MR. MCINERNEY: And I cannot say that we were precluded by law—

[JUDGE ALDISERT]: Of course you can't.

MR. MCINERNEY: —but we were precluded as a practical matter, if I may explain. At the time that Judge Kelly denied our decertification motion and then two weeks later denied any 1292 (b) application on jurisdiction, we were faced with a trial—we were in the trial pool for June of 1990 [for a trial] in which no defendant's liability, and not even any defendant's reason for being before the Court, would be determined because there would no identification of products and so on—and we'll get into that later. But on the other hand, there would be a prejudicial denial of the right to a fair trial in the jury verdicts that would result piecemeal [as distinguished] from what was contemplated under Gasoline Products and this Court's decision in Childers.

Because there was not time for us to file a 1292 (b) certification request and await Judge Kelly's response to that before filing a mandamus petition, at which time I submit to Your Honor, if he had denied it, we would be entitled to file [mandamus] because then there would be no clear—no other adequate remedy, then we felt that we had no alternative but to file this petition last March.

Now, it seems to me that if this were not a class action at all—and I think even if there were a special rule for class actions, which I don't believe—

THE COURT: Do you have any case in the Third Circuit since our case in Demasi where we permitted the issue of certification or decertification to come to us by mandamus?

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